CASE SUMMARIES

The following key indicates the court to which the case reference refers:

JRC	Royal Court of Jersey
GRC	Royal Court of Guernsey
JCA	Jersey Court of Appeal
GCA	Guernsey Court of Appeal
JPC	Privy Council, on appeal from Jersey
GPC	Privy Council, on appeal from Guernsey

ADVOCATES

Professional etiquette—code of conduct

James v Law Society of Jersey [2017] JRC 047 (Royal Ct: W. Bailhache, Bailiff, and Jurats Grime and Pitman)

The representor appeared in person; SJ Young for the first respondent; JS Dickinson for the second respondent; AJ Clarke for the third respondent

An advocate sought declaratory relief as to his professional obligations under the Law Society of Jersey Code of Conduct. The advocate had been provided by his client with certain documents, which had in turn been provided to the client anonymously. The client instructed the advocate to pass them to the advocate acting for the executors of her late father. The second respondent, also an advocate, stated that the documents were copies of papers belonging to him, that they were privileged communications and that they should be returned to him. The court considered r 2.1 (duty of disclosure) and r 2.2 (duty of confidentiality) of the Code of Conduct of the Law Society of Jersey and the associated Guidance.

Held: When a Jersey advocate or solicitor—in either case an officer of the court—receives documentation from any source other than his or her client which, on its face, he or she ought not to have because either it had been received by mistake or clearly belonged to someone else or is privileged, it is his or her duty not to read it, not to deploy it in any litigation on behalf of the client and to return it to the person entitled to it. Where the documentation is received from the client, the Jersey advocate or solicitor can advise the client upon it but should not deploy the documentation in any litigation without leave of the court

following an application with full disclosure of all relevant circumstances. Whether to grant such leave would be a matter of discretion for the trial court, probably the Judge sitting without Jurats.

COMPANIES

Distributions—order ratifying non-compliant distribution

In re RBSI Ltd [2017] JRC 120A (Royal Ct: Birt, Commr and Jurats Ramsden and Pitman)

MW Cook for the representors

The representors applied for orders under art 115ZA of the Companies (Jersey) Law 1991 that certain distributions they had made should be taken for all purposes as having been made in compliance with the requirements of art 115 of the Law. This was the first reasoned decision on art 115ZA.

Article 115ZA provides that where a distribution has been made by a company in contravention of art 115, the court shall, on the application of the company—

> "make an order that the distribution is to be treated for all purposes as if it had been made in accordance with that Article if the court—(a) considers that all of the conditions specified in paragraph (2) are met; and (b) does not consider that it would be contrary to the interests of justice to do so."

The conditions in para (2) of art 115ZA are that—

> "(a) immediately after the distribution was made the company was able to discharge its liabilities as they fell due; (b) at the time when the application is determined by the court the company is able to discharge its liabilities as they fall due; and (c) where the distribution was made less than 12 months before the date on which application is determined, the company will be able to carry on business, and discharge its liabilities as they fall due, until the end of the period of 12 months beginning with the date on which the distribution was made."

Held, granting the application:

Creditor-protective requirements for valid distribution. Prior to the introduction of the new art 115 in 2008, the governing principle was the maintenance of capital. Thus distributions could only be made out of profits. If there were no profits available for distribution, the company would have to redeem shares (if such shares were in issue) or proceed by way of a reduction of capital. Following the change in 2008, distributions no longer have to be made out of profits and may be made out of any account except nominal share capital and the

capital redemption reserve fund (if any). Creditors are protected by the requirement introduced in art 115(3) that the directors must make a statement of solvency as set out in art 115(4). Furthermore, art 115A provides that if a distribution or part of a distribution made by a company is made in contravention of art 115 and at the time of the distribution a member knows or has reasonable grounds for believing that it is so made, the member is liable to repay the distribution.

Possibility of ratification by court introduced in 2014. In order to avoid difficulties that might be caused as a result of a failure to comply with the technical requirements of art 115(4) (*ie* the directors omitting to make the necessary statement) even though there was not in fact a problem with solvency, the States introduced art 115ZA of the Law by means of the Companies (Amendment No 11) (Jersey) Law 2014. It was clearly envisaged that the process for obtaining an order under art 115ZA should not normally be complicated or controversial: reference was made to the report accompanying the 2014 Amendment.

Observations for the future assistance of practitioners—explanation required for default and for directors' belief in current and historic solvency. It is the court which, under art 115ZA, has to be satisfied that a company is able to discharge its liabilities as they fall due. It is in those circumstances not satisfactory for the directors simply to state that in their opinion the company is solvent without an explanation of the basis upon which they have reached that conclusion. The court was conscious of the desirability of such applications being fairly routine. They can be expected normally to be capable of being dealt with on a Friday afternoon. However, in order to ensure that this is so, the application needs to provide sufficient financial information to enable the court to see the basis upon which the directors have concluded that the company will be able to discharge its liabilities as they fall due and generally satisfy the requirements of para (2) of art 115ZA. A simple assertion that this is so without provision of any financial information is not sufficient to enable the court itself to reach a conclusion on the matter.

Scheme of arrangement—refusal of sanction

Puma Brandenburg Ltd v Aralon Resources and Investment Co Ltd Judgment 27/2017 (CA: Pleming, Bompas and Birt, JJA)

JP Greenfield for the appellant; AR Lyall for the respondents

The appellants, Puma Brandenburg Ltd, a property investment company investing in German real estate, appealed against a decision of the Royal Court refusing to sanction its proposed scheme of arrangement. The court's sanction was required (by Part VIII of the Companies (Guernsey) Law 2008 where a compromise or arrangement

was proposed between a company and its members or any class of them. The Companies Law contained a non-exhaustive definition of an "arrangement" which included a reorganisation of a company's share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both of these methods. The respondents were minority shareholders seeking to oppose the scheme. The proposed arrangement was to be between Puma and certain of its shareholders whereby Puma was to undertake a selective buy-back of all shares other than those held by Howard Shore (who was also an executive director of Puma and an indirect owner of Puma's investment adviser) and his wife (together, "the majority shareholders"). The arrangement would result in a takeover of Puma by Mr and Mrs Shore, with Puma financing the takeover and with dissentients being required to sell their shares.

In 2009, Puma had been acquired by Shore Capital Group Ltd (the holding company of a financial services group, and a company of which Mr Shore was executive chairman and a substantial shareholder). In 2012, it was involved in a demerger from Shore Capital Group Ltd and the majority of those who owned shares in Puma had been owners of shares in that company. Puma's year-on-year financial performance had been excellent and its board considered it had a "strong future". The board had however identified a "divergence" of interests between the majority shareholders who wanted to continue and expand the investments of Puma, and most of the various minority shareholders who, it was contended, said they had not intended to invest in a real estate company, having acquired their shares *via* the demerger in 2012.

The Bailiff refused to sanction the arrangement on the grounds that—

(i) The machinery in Part VIII of the Companies Law did not enable a company to acquire its own shares by way of an own-share buy-back in the absence of the consent of the shareholders whose shares were being acquired to that acquisition (see s 313(3) of the Companies Law). The necessary consent had not been and would not be obtained. A scheme of arrangement under the Companies Law could not be used where a company was seeking to acquire the shares of a member who did not want to sell to the company; and

(ii) As a matter of the court's statutory discretion (see s 110 of the Companies Law), the arrangement was not one he would sanction. The Bailiff found that when voting in favour of the scheme the members who approved the transaction (which included the significant shareholding of the brother of Mr Shore) were not acting in the *bona fide* best interests of the class as a whole.

On appeal, Puma argued that the Bailiff's first reason was mistaken: the arrangement when sanctioned would, without more, supply the shareholders' consents required by s 313 of the Companies Law for the company's acquisition of their shares. Puma submitted, in the alternative, that the scheme of arrangement itself allowed for the appointment of an agent to act on behalf of shareholders in giving consent, or that if necessary a simple amendment to the terms of the scheme could result in the consents being given by such an agent, and offered to make that amendment in the exercise of a power set out in the scheme document. As to the Bailiff's second reason, Puma contended that the Bailiff had misdirected himself when exercising the discretion which s 110 of the Companies Law required to be exercised if a proposed arrangement were to be sanctioned. The Bailiff had also found that the disclosure made to members in the explanatory statement was sufficient and this decision was challenged by the respondents on appeal.

Held: The provisions of Part VIII of the Companies Law, introduced in 2008, bore a close resemblance to those in Part 26 of the UK Companies Act 2006. The Royal Court had adopted the correct approach of drawing guidance on the interpretation and operation of the relevant sections from decisions of the English courts. As a matter of principle the expression "arrangement" in Part VIII of the Companies Law to describe types of schemes which may be implemented pursuant to that part, is broad. The UK courts had on numerous occasions sanctioned, under the equivalent legislation to Part VIII, schemes which had involved takeovers of companies by means of reductions of capital and own-share purchases and have accepted that such schemes involve "arrangements" within the meaning of the relevant legislation. In his judgment the Bailiff had observed that on its true meaning, an "arrangement" is capable of including the acquisition by a company of its own shares. The Bailiff was correct in his interpretation of the consent requirement under s 313 of the Companies Law. There was no reason why own-share buy-backs should be precluded from being effected by a scheme of arrangement. However, in view of the requirements of s 313(3), the court would require evidence that affected shareholders had individually and specifically consented to a scheme of arrangement before sanctioning such a scheme. The required consent element of s 313(3) could not be supplied by the court through the action of sanctioning the scheme of arrangement. This interpretation was clear from the language of the section, and supported by the absence in the Companies Law of anything expressly to disapply s 313(3) to schemes of arrangement. The Bailiff was correct to apply the traditional English tests for the exercise of the discretion. Those tests have been restated and applied many times. When exercising its discretion in this context,

the court will examine whether (i) the class of members was fairly represented by those who attended the court meetings and that the statutory majority were acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; (ii) the scheme is such that an honest and intelligent man, a member of the class concerned and acting in respect of his interests, might reasonably approve; and (iii) there is a "blot on the scheme". A "blot on the scheme" was a principle which recognised that the court must be satisfied that the scheme is appropriate to be sanctioned: in other words, the court must be satisfied that there is nothing about it which makes it oppressive of, or unfairly prejudicial to, persons who may be bound or affected by it.

The Bailiff had not erred in exercising his discretion against sanctioning the scheme and the Court of Appeal unhesitatingly would have refused to sanction the proposed arrangement for the following reasons—

(i) The scheme relied on the votes of shareholders who had committed to vote in favour of the scheme, but who were "insiders" closely associated with the majority shareholder, and that the offer price was the product of discussions between those insiders and the majority shareholder. The court was not satisfied that the majority shareholders at the meetings voted bona fide in the interests of the class of members as a whole;

(ii) The court was not satisfied that the arrangement was one "which an intelligent and honest man acting in respect of his interests might reasonably approve". Critical to this finding was the substantial transfer of value from the minority shareholders to the majority shareholders as a result of the share buy-back, along with the lack of evidence or explanation in the scheme documentation for the heavily discounted offer price which appeared to be without explanation based on the financial performance of the company; and

(iii) There was a "blot" on the scheme and it should not be sanctioned. Puma put undue pressure on shareholders to sell their shares at a price that had no real reference to the value of their shares by threatening that no dividends or distributions would be paid in the foreseeable future. Such conduct was oppressive. The court had "misgivings" about the Bailiff's conclusions regarding the sufficiency of the disclosure made to members in the explanatory statement. The company was required to give "such a statement of the main facts as will enable the recipients to exercise their judgment on the proposed scheme".

Puma's appeal was dismissed.

Comment [Natasha Newell]: This case demonstrates the necessity of obtaining individual shareholder consent when applying to the court to sanction a scheme of arrangement under s 313(3) of the Companies Law. The Court of Appeal clarifies that the absence of such consent will be fatal to any application to the court for the sanction of a scheme of arrangement. This case also highlights the importance of adducing evidence to show that a scheme is a fair one to those proposed to be bound.

COURTS

Rights of audience—representation by unqualified person

Trigwell v Clapp [2017] JRC 145 (Royal Ct: Birt, Commr and Jurats Nicolle and Grime)

The representor appeared on his own behalf; Mrs Jane Clapp appeared for the respondent

In a dispute concerning the beneficial ownership of a Jersey company which turned on the facts, the question was raised before Birt, Commr as to the circumstances in which the court would permit a party to be represented by a non-advocate. In this case, permission was sought for the defendant (Mr Clapp) to be represented by his wife (Mrs Clapp) in the circumstances referred to below.

Held:

Inherent jurisdiction to allow representation by another. As part of its inherent jurisdiction to control litigation before it, the court has discretion to allow one person to speak for another even if not legally qualified. Nothing in the *Loi (1961) sur l'exercice de la profession de droit à Jersey* specifically prohibited the defendant's wife from conducting the hearing on behalf of her husband.

But discretion to be exercised exceedingly sparingly. However, this was a discretion to be exercised exceedingly sparingly and only in exceptional circumstances. Some assistance as to the circumstances in which the court may choose to allow a non-lawyer to represent a party before the court could be obtained from the position in England, where the court has a similar power (now to be found in statutory form in the Legal Services Act 2007) to permit this to occur. The practice in England and Wales was summarised in Practice Guidance: McKenzie Friends (Civil and Family Courts) [2010] 4 All ER 272. Although the Practice Guidance dealt primarily with McKenzie Friends (who cannot address the court, make oral submissions or examine witnesses), it also dealt with the conduct of litigation by an unqualified person, paras. 21–23.

Decision on facts. The Commissioner concluded that this was one of those exceptional cases where permission should be granted for Mrs Clapp to conduct the litigation on her husband's behalf. He relied on the following matters: (i) the medical evidence was to the effect that Mr Clapp would not be capable of conducting the litigation himself; (ii) Mrs Clapp was a close relative of Mr Clapp (his wife)—this was not a case of someone who sought to exercise such rights on a regular basis being put forward; (iii) the court was informed that Mr Clapp could not afford to pay for a local advocate and was not eligible for legal aid as he did not reside in the Island; and (iv) it followed that, if Mrs Clapp were not allowed to represent Mr Clapp, he would be left to do so himself in circumstances where the medical evidence was to the effect that he was not capable of doing so.

CRIMINAL LAW

Appeal—appeals against conviction of corruption

De Kock v Law Officers, Judgment 33/2017 (Collas, Bailiff, and Logan Martin, Anderson JJA)

A Merrien for the appellant; R Calderwood for the respondent

This was the first prosecution for an offence of corruption under the Prevention of Corruption (Bailiwick of Guernsey) Law 2003. On 9 December 2016 the Royal Court sentenced Mr De Kock (the appellant), an agent of SG Hambros Private Bank, to 180 hours of unpaid work under a Community Service Order. He was convicted on a single count of corruption contrary to s 1 of the 2003 Law for corruptly accepting or obtaining a gift of a Jaguar motorcar from a Mr Sam Alaia as a reward or inducement to facilitate an application by Mr Alaia to the Bank for a mortgage loan of £975,000. The mortgage application met with some initial approvals and Mr Alaia travelled to Guernsey for a meeting with the Bank to finalise the application on 4 June 2013. He arrived by ferry with the Jaguar motorcar and met the appellant at the harbour. The appellant took possession of the car and made no payment for it. When subsequently questioned about it by his colleagues, he gave conflicting explanations. As a result of various disparaging remarks made by Mr Alaia (during his meeting with the bank) concerning a Mr Carruthers with whom he had previously operated a business account at the bank, the bank decided to sever its relationship with Mr Alaia and submitted a suspicious activity report (SAR) in relation to him to the Financial Intelligence Service (FIS). Mr Alaia was simply informed that his mortgage application was declined. However, the appellant continued to assist Mr Alaia in making applications to other banks for a similar mortgage. The appellant wrote his name in the car's registration book, spent his own money on repairs to it and researched how to comply with import and export regulations.

He parked it in the bank's car park and when questioned informally said he had owned the car for years. Mr Alaia was unsuccessful in obtaining a mortgage and later, on 12 November 2013, he emailed the appellant asking: "Can we sort something out with the car?". The prosecution case was that from 12 November, the appellant started to tell others that Mr Alaia was the owner and he effectively gave up ownership of it. The car was subsequently sold and the proceeds of the sale were paid into an account in the name of Mr Alaia's wife on Mr Alaia's instructions. The appellant appealed against conviction but not sentence. He argued that the Deputy Bailiff erred in law in refusing the appellant's application to exclude from evidence (i) an interview between the bank and the appellant (the HR interview) and/or the fact that this interview constituted a confession; and (ii) the subsequent police interviews, being a continuation of the HR interview, were therefore "fruit of the poisoned tree". The HR interview resulted from the FIS providing the bank with details of a customs interview with Mr Alaia, which referred to the Jaguar. The appellant contended that the FIS must have provided this information to the bank under s 8(1) and 8(2)(a) of the Disclosure (Bailiwick of Guernsey) Law 2007 (the Disclosure Law), whereby a police officer may disclose information to another person for the purposes of investigation of a criminal offence. The appellant contended that the HR interview therefore formed part of a criminal investigation under Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003 (PPACE) and that the interview breached the conditions of PPACE. The appellant further argued that the prejudicial effect of including certain matters (such as the HR interview, police interviews, business documents, and a file note) into evidence outweighed their probative value. He also argued that the trial should have been stayed in view of Mr Alaia's absence from it, that he should have had access to an interpreter as his first language was not English, that evidence of a witness who had read the *Guernsey Press* article on the case prior to giving evidence should be excluded, and finally that there was insufficient evidence and/or that the Jurats were not properly directed on the elements of the offence.

Held, appeal dismissed:

The Royal Court was correct to find that the HR interview was in fact an internal disciplinary investigation and not a criminal investigation. Accordingly it did not fall within PPACE. Mr Alaia had cooperated voluntarily with the Customs Officer and it was not therefore necessary for the Customs Officer to have used his statutory powers to obtain information from Mr Alaia. It followed that the information obtained was not confidential and did not require the protection of s 8 of the Disclosure Law. The provision of information of details of the customs interview by the FIS to the bank did not impose a duty on the bank to carry out a criminal investigation or to

state that the information was being provided to them for this purpose. Since the bank was not under a duty to investigate a possible criminal offence, it was not required to comply with PPACE. Any appeal in relation to the use of the HR interview by the police in their later interviews with the appellant would therefore fall away. As regards the alleged prejudicial effect of including the HR and police interviews, the interviews were in fact mixed statements but there was no suggestion that the appellant would have acted differently if he had been cautioned and no fault was to be found in the Royal Court's finding that it was preferable to have the interview records admitted in their entirety in order to lay the "complete picture" before the Jurats. Since the statements showed that the appellant had lied, the Deputy Bailiff gave the Jurats the appropriate direction concerning lies. The inclusion of hearsay documents, considered to be "business documents" had been necessary in order to set out the full story for the Jurats and as the Deputy Bailiff had set out in his judgment, the evidence included in the relevant documents was not the sole evidence on the issues contained in them. The Deputy Bailiff was right to allow the file note into evidence, which was a reliable, largely contemporaneous business document. The argument that the Royal Court should have stayed the proceedings in view of Mr Alaia's absence from the trial would be dismissed. The Deputy Bailiff's decision not to stay the proceedings had been reasoned in the judgment of the Royal Court, namely, if Mr Alaia had attended at the instance of the Law Officers, he would have appeared as a co-defendant and would either have been likely to have been an unreliable witness if he had pleaded guilty or could have retained his right to silence if he pleaded not guilty. In the circumstances, Mr Alaia's absence did not render the trial unfair. Nor had the Deputy Bailiff been required to direct the Jurats that English was not the appellant's first language. This was not an issue which had been raised in evidence and the fact that the appellant was an Afrikaans speaker would have meant nothing to the Jurats without knowing the extent to which he could express himself in English. There would have been plenty of opportunity for the appellant to have led evidence on this issue had he wanted to. The Deputy Bailiff did indeed give a direction to the Jurats in relation to the evidence of the witness who had read the *Guernsey Press* article on the case prior to giving evidence. None of the arguments regarding the Deputy Bailiff's summing up to the Jurats was made out. The court had considered the Deputy Bailiff's summing up in the round and was satisfied that there was no error of law on the part of the Deputy Bailiff in his directions to the Jurats that would render the conviction unsafe.

LAND LAW

Leases—breach of lease going to root of letting—remedy of treating lease as terminated

Hong Kong Foods v Robin Hood Curry Ltd [2017] JCA 183 (CA: McNeill, Bompas and Anderson, JJA)

The second appellant appeared in person; C Hall for the respondents

On an appeal against the Royal Court's decision in *Hong Kong Foods Ltd v Robin Hood Curry Ltd*,[1] the question was raised as to when the remedy of termination was available to a lessee on the ground of the lessor's breach; in this case, the proceedings concerned a sub-lease.

Held, as to the general points of law:

Implied term that property is free from defects defeating purpose of letting. A lessor undertakes to the lessee that the subject of the letting is free from defects (*vices*) which make the property incapable of being used for the purpose for which it is let: *Selby v Romeril*,[2] Pothier, *Traité du Contrat de Louage*.[3] In essence, the first proposition is that in a contract of letting or hire there is normally to be implied a condition as to the absence of defects destructive of the substance of the letting. This proposition is, in modern terms, an application of the general principles on which terms are implied into contracts. Those principles are applicable in the context of landlord and tenant contracts: *Moore v Hong Kong Foods Ltd*,[4] *Grove v Baker*,[5] and *Infrastructure Minister v St Helier (Parish)*.[6] However, in accordance with the maxim *la convention fait la loi des parties*, it is also open to parties to a lease to decide by their contract on the allocation of their respective rights and responsibilities.

Circumstances where self-help right of termination arises. Where a lessor is in breach of an implied term, in an appropriate case the lessor is obliged to accept the termination of the letting and damages where sustained by the lessee: *Selby v Romeril*. The law recognises that, in an appropriate case, a breach of contract can give the innocent party the right to treat the breach as discharging the parties from further obligation under the contract (apart, that is, from any obligation on the part of the contract-breaker to pay compensation

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[1] [2017] JRC 50.
[2] 1996 JLR 210, at 221.
[3] Part 2, Chapter 1, paras 109–110, at 83–84.
[4] [2010] JRC 127.
[5] 2005 JLR 348.
[6] [2016] JRC 153, upheld on appeal, [2017] JCA 27.

for non-performance) without having to apply to court for the remedy of resolution to have the contract avoided for breach. But the discharge by reason of breach requires the innocent party to show by some word or action that that party is treating further performance of the contract (apart, that is, from any obligation on the part of the contract-breaker to pay compensation for non-performance) as at an end. The innocent party may lose the right to treat the contract as terminated, where the innocent affirms the contract or delays in accepting that it has terminated. The breach must, moreover, be sufficiently serious. It is an extreme remedy. To adopt the expression used by the Royal Court, the breach needs to go to the root of the contract of letting. Another way of characterising such a breach would be one which vitiated the whole purpose of the contract of letting: *Hussein v Mehlman*.[7] As to Scots law, the Court of Appeal referred to Gloag, *Law of Contract*,[8] from which assistance could also be derived, and where it is noted *inter alia* that rescinding the contract is an extreme remedy and both parties must be reasonable, and that if the landlord undertakes to put the house into a habitable condition, the tenant should give him a sufficient opportunity of doing so (*per* Lord Kinnear, *M'Kimmie's Trustees v Armour*.[9]

Disposal of these appeals. In this particular appeal, no definitive ruling on the facts and terms of lease was made. The sub-lease had been held by the first appellant (Hong Kong Foods Ltd) but that company had in fact been struck off the register of companies in 2014; the Court of Appeal declined, in the circumstances, to rule on its appeal and ordered that further proceedings thereon should be stayed until such time, if ever, as it was restored to the register of companies and further application was made to the Court of Appeal. As to the second appellant (Mr Gibbons), he was merely the guarantor of the head lease and had no contractual relationship with either of the respondents. He therefore had no claim for breach of contract against them and his appeal was dismissed.

Proprietary estoppel

Carry v Liston [2017] JRC 144 (Royal Ct: McMahon, Commr and Jurats Bartie and Le Pelley)

RA Falle for the plaintiff; H Sharp for the defendants

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[7] [1992] 2 EGLR 87.
[8] 2nd edn, at 605.
[9] (1899) 2 F 156, at 162.

In a boundary dispute between neighbours, the question was raised as to whether Jersey law recognised actions for proprietary estoppel. In response to the plaintiff's action against the defendants *pour exhiber titre* in relation to the strip of land in question, the defendants argued *inter alia* that they had acquired ownership of the land by proprietary estoppel.

Held, finding that the doctrine of proprietary estoppel did not exist under Jersey law, to the extent that the relief sought is a proprietary remedy over immovable property.

Inconsistent *dicta* in the cases. The question whether proprietary estoppel was recognised by Jersey law was the subject of decisions of the Royal Court which were not entirely consistent. The two most recent cases in which the court concluded that the doctrine does not exist (*Flynn v Reid*[10] and *Fogarty v St Martin's Cottage Ltd*[11]) were both cases in which it was not necessary for the court to give such a ruling. Before that, the existence of the doctrine was accepted in *Cannon v Nicol*[12] without argument and the relief sought was confined to damages. *Maçon v Quérée*[13] was also a case confined to a claim for damages and so did not involve any exploration of the difficulties that might arise in relation to deeply entrenched principles of Jersey land law. In *Pirouet v Pirouet*,[14] the court appears not to have considered that it was departing from a previous decision of the court. The acknowledgement that a new line of authority was being established only came in *Maçon v Quérée*. In the absence of any decision from the Court of Appeal, the state of Jersey law was currently uncertain on this issue.

Effect of earlier decisions of the Royal Court on the Royal Court. The strict doctrine of *stare decisis* does not exist in Jersey. The Royal Court is—

> "generally bound by decisions of the Court of Appeal and of course, as it always has been, by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. We qualify the proposition only because, in our judgment, it is open to the Royal Court, as it would be to a Scottish Court, to decline to follow a decision which has been invalidated by subsequent legislation or some such compelling

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[10] 2012 (1) JLR 370.
[11] [2015] JRC 068.
[12] 2006 JLR 299.
[13] 2001 JLR 80.
[14] 1985–86 JLR 151.

> change in circumstances . . . The Court is not bound by decisions of the Judicial Committee of the Privy Council sitting on appeal from some other jurisdiction."[15]

The Inferior Number is not bound by its own decision on points of law but it will not depart from an earlier decision unless persuaded that the earlier decision was wrongly decided. The degree of deference to other decisions of the Royal Court was that also articulated as regards the English High Court by Lord Neuberger in *Willers v Joyce (No. 2)*[16]—

> "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Patel v Secretary of State for the Home Dept* [2012] EWCA Civ 741, [2012] 4 All ER 94, [2013] 1 WLR 63 (at [59]). I would have thought that circuit judges should adopt much the same approach to decisions of other circuit judges."

***Felard* and *Flynn* to be preferred; importance of title by *possession quadragénaire*.** It was necessary to have regard to the well-established principles underpinning claims for *possession quadragénaire*, as to which reference was made to Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey*[17] and the Code of 1771—

> "*Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, quarante ans, ou au-delà, ne pourront être inquiétés, ni molesté à l'égard de la propriété dans la chose possédée . . .*"

Finding that proprietary estoppel could be asserted to acquire title to immovable property, the court found the reasoning in *Felard Invs Ltd v Church of Our Lady &c (Trustees)*[18] and *Flynn v Reid* persuasive. In both cases, there was a principled analysis of how the doctrine of proprietary estoppel in respect of land ownership presents problems because of the system of passing contracts before the court and requiring the parties to take the oath. The validity of such a contract is susceptible to challenge on any of the usual established bases and the

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[15] *State of Qatar v Al Thani* 1999 JLR 118.
[16] [2017] 2 All ER 383.
[17] At 230–33 (1943).
[18] 1978 JJ 1.

customary law of *possession quadragénaire* presumed abandonment of the title acquired by contract after a 40-year period. To that extent, the law was clear, unambiguous and certain. There was no need for the outcome dictated by law to be tempered in any way by the interposition of *équité*. If the doctrine of proprietary estoppel applied to such a case, it would be undermining the customary law by removing from a landowner the ability to avoid the consequences of inaction by taking appropriate action within that 40-year period. That period might be regarded as unduly long in modern times, but that was an issue for the legislature rather than the court to resolve.

Possibility of proprietary estoppel being raised as a basis for a non-proprietary remedy. *Maçon v Quérée* recognised at para 29 that there were situations in which—

> "the tension between the demands of equity on the one hand and deeply entrenched principles of Jersey land law will pose difficulties."

The present case was precisely one of the cases that the court may have had in mind; no one could suggest that *possession quadragénaire* is not deeply entrenched. *Maçon v Quérée* involved a very different outcome from that claimed by the defendants in the present case; the defendants sought a remedy conferring upon them some continuing interest in land, thereby adversely affecting the plaintiff's legal rights as the landowner. It was beyond the scope of the present case for the court to opine definitively on whether the doctrine can be prayed in aid in a case where the only relief sought is an award of damages.